Service Date: June 8, 2005

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF the Applications of Qwest Corporation and:	)	UTILITY DIVISION
AT&T;	)	DOCKET NO. D2005.4.57; ORDER NO. 6652
Primetime;	)	DOCKET NO. D2005.4.59; ORDER NO. 6653
Lightyear;	)	DOCKET NO. D2005.4.60; ORDER NO. 6654
Ionex;	)	DOCKET NO. D2005.4.61; ORDER NO. 6655
Bullseye;	)	DOCKET NO. D2005.4.62; ORDER NO. 6656
VCI;	)	DOCKET NO. D2005.4.64; ORDER NO. 6657
Preferred Carrier;	)	DOCKET NO. D2005.4.65; ORDER NO. 6658
McLeod;	)	DOCKET NO. D2005.4.67; ORDER NO. 6659
DIECA;	)	DOCKET NO. D2005.4.68; ORDER NO. 6660
Contact;	)	DOCKET NO. D2005.4.69; ORDER NO. 6661
PiperTel;	)	DOCKET NO. D2005.4.70; ORDER NO. 6662
Vycera; and	)	DOCKET NO. D2005.4.71; ORDER NO. 6663
New Rochelle	)	DOCKET NO. D2005.4.72 ORDER NO. 6664
Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of their Interconnection Agreement	)	

ORDER ON FILING REQUIREMENT OF INTERCONNECTION AGREEMENTS PURSUANT TO 47 U.S.C. §252

Introduction and Background

1. On December 21, 2004, the Montana Public Service Commission (Commission or PSC) issued Order No. 6611 in Docket No. D2004.7.119. In Order No. 6611, the PSC concluded that an interconnection agreement between Qwest Corporation (Qwest) and MCI was an interconnection agreement subject to the filing requirements of 47 U.S.C. §252.[1] The PSC reviewed the interconnection agreement pursuant to 47 U.S.C. §252(e) and issued its decision approving the agreement in Order No. 6611.

[1] The agreement was filed by MCI for review and approval and filed by Qwest for informational purposes only. See Order No. 6611.

2. Since June of 2004 Qwest has filed several interconnection agreements like the MCI agreement titled Qwest Platform Plus (QPP) agreements, indicating that the agreements are being filed for informational purposes only. As the MCI agreement, the PSC has treated all of these agreements as subject to the filing requirement of 47 U.S.C. §252.[2] Since the PSC's Order 6611 was issued in the Qwest – MCI interconnection agreement, Qwest has filed its QPP agreements under protest. Qwest also filed motions for reconsideration of the PSC's decision to treat the QPP agreements as subject to the filing requirement of 47 U.S.C. §252, all of which were denied.

3. The interconnection agreements set forth in the caption of this Order were filed by Qwest under protest. The PSC has concluded that these QPP agreements are subject to the filing requirement of §252. The purpose of this Order is to clarify the PSC's decision to treat Qwest's QPP agreements as subject to the §252 filing requirement.

Findings of Fact, Applicable Law and Commission Decision

4. On February 8, 1996, the Telecommunications Act of 1996 (1996 Act)[3] was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to the local exchange markets. The 1996 Act sets forth methods by which local competition may be encouraged in historically-monopolistic local exchange markets. The 1996 Act requires companies like Qwest to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. §§ 251 and 252.

5. The interconnection provisions contained in §§251 and 252 of the Act are the cornerstone of competition and deregulation. Compliance with the requirements of interconnection is the first and strongest protection against discrimination by an incumbent carrier against its competitors. Under the Act, a competing carrier may negotiate an interconnection

[2] Qwest filed the following QPP agreements with the PSC, between Qwest and the referenced party, in the docket number listed: D2004.8.140, Granite Communications LLC; D2004.9.147, New Access Communications; D2005.1.10, 1-800-Reconex, Inc.; D2005.1.2, ANC Communication Services, Inc.; D2005.1.6, OrbitCom, Inc.

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

agreement directly with Qwest, or if private negotiations fail, either party may seek arbitration by a state commission, which in Montana is the PSC. Sections 252(a) and (b). In either case, the interconnection agreement must ultimately be filed with the PSC for final approval. Sections 252(a) and (e).[4] Within 10 days of approving the agreement the state commission must make the agreement available for public inspection and copying. Section 252(h). Once an agreement is approved, it is available "to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." Section 252(i).

6. 47 U.S.C. §252(a)(1) reads:

> (a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATION
> (1) VOLUNTARY NEGOTIATIONS
> Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

Section 252(a)(1) requires negotiated interconnection agreements to be submitted under §252(e).

7. 47 U.S.C. §252(e) reads as follows:

> (e) APPROVAL BY STATE COMMISSION
> (1) APPROVAL REQUIRED
> ***Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission.*** A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies. (Emphasis added.)

Nothing in §252(e) limits the filing requirement of interconnection agreements to those that implement duties contained in §§251(b) and (c).

8. The Federal Communications Commission (FCC) clearly and unambiguously interpreted §252 as requiring all interconnection agreements to be filed with state commissions in the first instance. In the FCC's analysis of §252, it concluded that the Act does not exempt

[4] In Montana over 200 interconnection agreements have been reviewed and approved by the PSC since 1996.

certain categories of agreements from the public filing requirement and that state commissions should have the opportunity to review *all* agreements.[5] The FCC concluded:

> Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the state commission under section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with section 252(i).[6]

The FCC was clear that the filing requirement of §252 is a significant provision in implementing the market opening goals Act.

9. On April 23, 2002, Qwest filed a petition for a declaratory ruling with the FCC, seeking a ruling on the scope of the mandatory filing requirement set forth in section 252 of the Act.[7] The Minnesota Public Utilities Commission had filed a complaint against Qwest, alleging that Qwest failed to file and seek the Minnesota PUC's approval of certain interconnection agreements.[8] In response to the complaint Qwest sought a ruling from the FCC on the scope of the mandatory filing requirement set forth in §252(a)(1) of the Act.

10. On October 4, 2004, the FCC issued its Memorandum (Declaratory Ruling) and Order on Qwest's petition, concluding that "state commissions should be responsible for applying, in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements."[9] The FCC declined to establish an exhaustive, all-encompassing "interconnection agreement standard" and encouraged state commissions to decide in the first

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[5] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, ¶¶165, 167 (emphasis in original).

[6] *First Report and Order* ¶167.

[7] Qwest Communications International Inc., *Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1),* WC Docket No. 02-89, released October 4, 2002 (Declaratory Ruling).

[8] *See*, Qwest v. The Minnesota Public Utilities Commission, 2004 U.S. Dist. LEXIS 16963 (D.Minn. 2004)(district court upheld monetary penalty imposed by state commission for violation of filing requirements of §252, but vacated restitutional relief imposed as beyond the state commission's authority).

[9] In the Matter of Qwest Communications International Inc., *Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1),* WC Docket No. 02-89, Memorandum and Order released October 4, 2002, ¶7 (Declaratory ruling).

instance which sorts of agreements fall within the statutory standard. Declaratory ruling, ¶10-11. The FCC observed that agreements must be filed under §252(a)(1) whenever they "create an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation." Id., ¶8. The FCC unequivocally declined to establish an interconnection agreement standard and concluded that state commissions are the first arbiter of which interconnection agreements must be filed. Id., ¶¶10, 11.

11. The FCC interpreted the filing requirement of §252 again in a decision released on March 12, 2004[10] in which FCC issued a Notice of Apparent Liability For Forfeiture (NAL) against Qwest. The FCC found that fines in the amount of 9 million dollars were appropriate for Qwest's failure to file interconnection agreements with state commissions pursuant to §252. In the NAL, the FCC interpreted its Declaratory Ruling of 2002, and reiterated that "on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions." (NAL ¶11, citing Declaratory Ruling ¶8.)

12. The FCC concluded that Qwest's failure to file agreements in compliance with §252(a) of the Act "undermines the effectiveness of the Act and our rules by preventing competitive LECs (or "CLECs'") from adopting interconnection terms otherwise available only to certain favored CLECs." NAL ¶2. The purpose of the filing requirement of §252(a) is to create a mechanism through which competitors can avoid the delay and expense of negotiating new agreements. Without such a mechanism, the non-discriminatory, pro-competition purpose of §252(i) would be defeated. Id. at ¶20.

13. The FCC concluded that "Section 252(a)(1) is not just a filing requirement. Compliance with Section 252(a)(1) is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors." NAL, ¶¶31, 46. The FCC gave a broad construction to the filing requirement of §252(a)(1), id. at ¶21, and reiterated the role of state commissions in determining in the first instance what interconnection agreements must be

[10] *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, released March 12, 2004 (NAL).

filed. Id., ¶¶ 33-36.

14. The PSC finds persuasive the FCC's statement in its Declaratory Ruling that "the state commissions should be responsible for applying in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements." Declaratory Ruling ¶7. The FCC declined to establish an exhaustive, all-encompassing interconnection agreement standard, leaving it to the state commissions to decide in the first instance whether a specific agreement should be filed under §252. Declaratory ruling ¶10.

15. Qwest's QPP agreements are subject to the filing requirement of §252 because these agreements are voluntarily negotiated, binding agreements under which Qwest has agreed to provide network elements to competing carriers. It is clear in these agreements that 1) Qwest is an incumbent local exchange carrier; 2) the competitors are leasing network elements from Qwest; 3) Qwest and its competitors have voluntarily negotiated and entered into binding agreements that allow the competing carrier to lease network elements from Qwest; and 4) the agreements contain a schedule of charges for the elements being leased. Pursuant to §252 the QPP agreements must be filed.

16. The purpose of the first sentence of §252(a)(1) is to reward carriers for independently contracting for interconnection and provisioning of goods and services. Section 252(a)(1) "permits incumbent and entering carriers to negotiate private rate agreements." Verizon Communications v. FCC et al, 535 U.S. 467, 492 (2002), and the "reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and (c)." MCI Telecommunications Corporation v. U S WEST Communications, 204 F.3d 1262, 1266 (9th Cir. 2000). *All* interconnection agreements, however, regardless of the substance of the agreement, must be filed with the state agency. Id. at 1266; §252(e)(1).

17. Carriers entering voluntary negotiations in order to avail themselves of the exemption of §252(a)(1) from the substantive requirements of §251(b) and (c), do not, by virtue of such voluntary negotiations, thereby obtain an exemption from the procedural filing requirements of §252(a)(1). An incumbent is free to negotiate an agreement to provide network elements without regard to the duties it would otherwise have under §251, but any agreement

must be filed with the state commission for limited review and approval. Iowa Utilities Board v. Federal Communications Commission, 525 U.S. 366, 373-374 (1999). If carriers voluntarily negotiate an agreement, state commissions are required to accept the agreement unless it discriminates against a nonparty to the contract or is otherwise not in the public interest. §§252(e)(1) and (e)(2)(A); Verizon Communications v. FCC et al, 535 U.S. 467, 492 (2002).

18. Incumbents like Qwest must provide for the asking, through a negotiated interconnection agreement, elements of its network at any technically feasible point on Qwest's network. The FCC determines what network elements should be made available for purposes of 47 U.S.C. §251(c)(3). 47 U.S.C. §251(d)(2). Since the Act was passed in 1996, the FCC has implemented five rulemakings setting forth network elements that must be made available to competitors.[11] The most recent rulemaking was released on February 4, 2005, and is currently being appealed to the District of Columbia Circuit Court of Appeals.[12] Over the course of a decade and two political administrations, the once rich FCC shopping list of network elements available to competitors has become a beggar's table.

19. The FCC's list has changed five times in the last nine years. The PSC finds that the filing requirement of 47 U.S.C. §252 is not triggered solely by the inclusion in the agreement of elements on the current FCC shopping list. It the FCC's current list of elements were the only trigger to the filing requirement of §252, then the telecommunications market will have no certitude about what elements and services are available, and at what rates. Reading the filing requirement of §252 as contingent upon an ever changing list of network elements will increase,

[11] In August of 1996 the FCC issued its first rulemaking concluding that seven specific network elements had to be leased to competitors. *In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499-16253 (1996). The FCC later added more elements to the list. *UNE Remand Order*, November 1999, 15 FCC Rcd 3696. The FCC issued its Triennial Review Order in August of 2003 in which the list of elements was considerably shortened. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (Triennial Review Order). On August 20, 2004, the FCC released its Interim Order which further shortened the list of elements. On February 4, 2005 the FCC released its latest list of elements in the Triennial Review Order on Remand, further limiting the elements subject to mandatory unbundling. *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, Released February 4, 2005.

[12] Petitions for review were filed in April, 2005, and briefs are not yet due in that appeal.

rather than reduce, market volatility. The filing requirement of §252 is not contingent upon an ever changing FCC list of network elements.

20. Parties are free to reach any agreement they wish, without regard to the duties contained in §251, but any agreement must be filed with the state commission for approval. CoServ Ltd. Liability Corp. v. Southwestern Bell Telephone Co., 350 F.3d 482, 485 (5th Cir. 2003). Negotiations entitle carriers to avoid the duties specified in §251 and the pricing standards set forth in §252(d), but they do not entitle carriers to avoid the filing requirement of §252(a) and (e). Verizon, 535 U.S. at 492.

21. The primary reason to include a detailed schedule of itemized charges for interconnection and each service or element included in the agreement is to give competing carriers a meaningful opportunity to opt in to the negotiated agreement pursuant to §252(i). Information about services and elements offered, and their price, is critical to competitors. Inclusion of prices, services and elements in an agreement would be unnecessary if the agreement were not to be made available to competitors under §§252(h) and (i). The filing requirement of §252 is the "first and strongest protection under the Act against discrimination by the [incumbent] against its competitors."[13] By requiring agreements to be filed with the state commission regardless of whether they implement specific §251 duties, Congress gave the state commissions the ability to ensure that agreements between an incumbent and one competitor do not discriminate against other competitors.

22. One of the most significant consequences of the public filing requirement is that agreements approved by a state commission are available to other telecommunications carriers. Section 252(i). Section 252(h) directs that all agreements approved by a state commission be made available for public inspection and copying within 10 days after the agreement is approved. This public filing requirement serves one of the Act's core purposes: to ensure that an incumbent does not discriminate against other competitors. Section 252(h) allows public inspection, and §252(i) requires the incumbent to make its network elements further available to any other

requesting telecommunications carrier on the same terms and conditions as those provided in the agreement.[14]

23. In Montana, this has critical ramifications. There are a limited number of carriers in Montana competing against Qwest in the local exchange market. [15] Small local carriers like Blackfoot Communications in Missoula and OneEighty Communications in Billings are not always in a position to negotiate term and volume discounts with Qwest, like bigger competitors might be able to negotiate. The filing requirement of §§252(a) and (e) and the attendant opt in provision of §252(i) gives smaller carriers the option of electing favorable terms and conditions negotiated by larger competing carriers that smaller carriers are not able to negotiate. The state commission's role in assessing the competitiveness of the local market and the necessity for interconnection agreements to be available to all carriers through the public filing requirement of §252 is an essential component of the market opening provisions of the Act.

24. The purpose of the filing requirement is to make the agreements publicly available to competitors and to ensure that the ILEC is behaving in a non-discriminatory manner. Unless interconnection agreements are available to other carriers via the §252 process "Qwest's competitors would not be able to opt into those agreements pursuant to §252(i) because they would be unaware of the previous agreements' existence, not to mention the specific terms and conditions." Id. at ¶31. In the NAL, the FCC interpreted its Declaratory Ruling of 2002, and

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[13] In the Matter of Qwest Communications International Inc., *Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum and Order released October 4, 2002, ¶46.

[14] The FCC originally interpreted §252(i) as allowing competing carriers to "pick and choose" which terms and conditions the competitor wanted from a filed agreement. Recently the "pick and choose" rule was replaced by an "all or nothing" rule that requires a competing carrier to take all of the terms and conditions in a filed agreement or none of them. The all or nothing rule increases the importance of the filing requirement of §252 and the attendant opt in provision of §252(i). *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, 19 FCC Rcd 13494 (2004).

[15] As of 1/31/04, Qwest informed the Commission that the CLECs purchasing UNE-P in Montana were Three Rivers, Excel Telecommunications; Ionex; MCI Metro; McLeod; New Access; NOS Communications; One Eighty (Avista); OptiCom; Vartec; and Z-Tel. Since March of 2004, Z-Tel informed the Commission it would no longer be offering service in Montana, and MCI has ceased marketing its services in Montana.

reiterated that "on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions." [16]

25. Qwest's QPP agreements implement Qwest's duties under §251, and consequently the agreements are subject to the filing requirement of §252. The statutory language of 47 U.S.C. §252(e) is clear on its face: *any* interconnection agreement shall be filed with the state commission for review and approval. The FCC has stated that an agreement relating to §251(b) or (c) must be filed with a state commission for approval (Declaratory Ruling footnote 26) and that any agreement pertaining to unbundled network elements must be filed pursuant to §252(a)(1). (NAL ¶22, citing the declaratory ruling ¶8.) Qwest's QPP agreements implement Qwest's obligations to open its network to its competitors under §251, and as a result the agreements are public agreements subject to the filing requirements of §252.

26. The FCC has clearly left it to each state commission to determine in the first instance whether a specific agreement is to be filed under §252. Declaratory ruling ¶7, ¶¶10-11. The PSC finds that Qwest's QPP agreements must be filed with the PSC and upon review and approval will thereby be available to competitors as a matter of law. Requiring the agreements to be filed under §252 accomplishes the objectives of the Act, as reiterated by the FCC in its NAL, that filing of interconnection agreements under §252 is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors. The PSC finds that it is critical to ensure this protection is afforded to competitors operating in the Montana market, and consequently finds that Qwest's QPP agreements must be filed under §252, resulting in availability to all of Qwest's competitors as a matter of law.

Conclusions of Law

1. The PSC has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. Qwest is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

[16] NAL ¶11, citing Declaratory Ruling ¶8.

2. The PSC has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the* Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

4. The PSC finds that Qwest's QPP agreements are negotiated interconnection agreements subject to the filing requirements of 47 U.S.C. §252(a)(1) and §252(e).

5. The PSC has jurisdiction to review and approve the agreement negotiated by the parties and submitted to the Commission according to § 252(e)(2)(A). Section 69-3-103, MCA.

Order

THEREFORE, based upon the foregoing, it is ORDERED that Qwest's QPP agreements shall be submitted to the PSC for review and approval pursuant to the 1996 Act.

DONE AND DATED this 2nd day of June 2005, by a vote of 5 to 0.

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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GREG JERGESON, Chairman

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BRAD MOLNAR, Vice Chairman

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DOUG MOOD, Commissioner

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ROBERT H. RANEY, Commissioner

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THOMAS J. SCHNEIDER, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.